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IN THE

Supreme Court of the United States

No. 458

CLIFFORD J. HYNNING, As General Partner of and Trustee for Hynning Associates, a Limited Partnership,
Petitioner

v.

DANIEL PARTRIDGE, III, as Trustee, u/w Grace S. Partridge, et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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v.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Clifford J. Hynning, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The findings of fact, conclusions of law, and judgment of the District Court, dated June 29, 1965, are found at R. 62-65.[1] The judgment of the Court of Appeals was

[1] References to the record "(R.———)" are to the Joint Appendices as printed in the appellate court in Nos. 18,264 and 19,573, respectively. These Joint Appendices are consecutively numbered. Pages 1 to 56, inclusive, appear in the Joint Appendix in No.

entered on April 5, 1966 (Appendix A). A petition for rehearing en banc was denied on May 20, 1966.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (2).

QUESTIONS PRESENTED

Petitioner initiated this litigation as purchaser to secure specific performance of one of the seller's contract obligations. The trial court gave summary judgment for petitioner, but this was reversed on appeal. Thereupon respondent reasserted a counterclaim for payment of counsel fees incurred by him in defending against petitioner's suit for specific performance and relied on the fact that petitioner had executed a deed of trust which contained a standard clause on litigation expenses in the event of default in payment of the note.

The questions presented are:

1. Whether a losing litigant in a contract action for specific performance must pay, in addition to taxable costs, counsel fees of the prevailing litigant merely because the loser was *also* a mortgage debtor under a deed of trust which, in its default provisions, contained a standard clause on litigation expenses, notwithstanding the undisputed facts that

(a) the mortgage debtor was not in default in any respect under his promissory note;

18,264; pages 57 to 74, inclusive, appear in the Joint Appendix in No. 19,573.

Petitioner has contemporaniously filed with this petition a motion requesting permission to use the record in Clifford J. Hynning, Petitioner, v. Daniel Partridge, III, Respondent, No. 766, October 1964 term.

(b) the mortgage debtor, as the purchaser, was the plaintiff in the suit for specific performance; and

(c) the counsel fees were wholly incurred by the seller (who is also the mortgage creditor) in defending the contract action for specific performance?

2. Whether under specific remand from an appellate court to enter summary judgment for the prevailing appellant, the trial court could, in addition to the entry of such judgment, also consider a *new* motion by the appellant for summary judgment on a counterclaim which was nowhere cited in the remand (i.e., appellate opinion and certified copy of judgment)?

STATEMENT OF THE CASE

Petitioner has consistently asserted that there is no legal connection between (1) the counsel fees incurred by a seller of real property (who is also the mortgage creditor under a purchase-money mortgage) in defending a contract action for specific performance brought by the purchaser (who is also the mortgage debtor) and (2) the default provisions of a deed of trust obligating the mortgage debtor to pay the creditor's "expense of litigation as aforesaid." [2]

Petitioner originally sued in 1963 as purchaser for specific performance of a clause in his sales contract calling for the seller's subordination of the purchase-money mortgage in connection with the purchaser's improvements of the property. Petitioner at first prevailed in the trial court (R. 53-55), but lost on appeal. Partridge v. Hynning, 119 U.S. App. D.C. 33, 335 F 2d 994 (1964). The subordination issue was before this Court at its October 1964 term in No. 766, where certiorari was denied, 380 U.S. 911, 13 L ed 2d 798, 85 S. Ct. 896 (1965). The

[2] See the excerpts from the deed of trust, infra p. 22, n. 1 and Appendix B.

appellate opinion was totally silent on respondent's counterclaim for counsel fees. Consequently, neither side argued any issue of counsel fees.[3] Petitioner believes that this Court did not pass on anything other than the submission in the petition for certiorari, to wit, the subordination issue and the remand for the entry of summary judgment. This Court has therefore not passed on question 1 above; nor has any other court in the United States, except the lower courts in this litigation.

The appellate remand directed the trial court to enter summary judgment in favor of respondent and allow taxable costs. Nothing in the remand contained any direction to the trial court on respondent's counterclaim for counsel fees in defending the contract action, which had been denied by the trial court in its original judgment; in fact neither the opinion nor the judgment contained one word bearing on the "counterclaim," "counsel fees," or "litigation expenses."

Respondent thereupon on May 21, 1965, filed in the trial court a new motion for summary judgment on his counterclaim for counsel fees (R. 57-59). On June 18, 1965, petitioner filed a motion in the appellate court to recall and clarify the mandate. On June 29, 1965, the trial court entered judgment against petitioner in the amount of $6,668.51 and ruled "The decision of the Court of Appeals reinstates the defendant's counterclaim for counsel fees. Under the terms of the deed of trust . . . [respondent] . . . is entitled to recover of the . . . [petitioner] . . . the amounts paid or incurred by him for costs and expenses (including reasonable counsel fees) on account of any litigation arising with respect to the

[3] In his "Statement of the Case" in No. 766, petitioner said (at p. 7): "The District Court . . . also denied respondent-seller's counterclaim for attorney's fees." Nothing further was said of this issue. The respondent's brief in opposition was wholly silent on the counterclaim for attorney's fees, as had been the appellate opinion.

trust . . . ," and that legal services involved "arose out of litigation with respect to the trust" (R. 63-65). On October 4, 1965, the appellate court denied the motion to recall "without prejudice to appellee's appeal from judgment allowing counsel fees."

The same panel of the appellate court, which had handed down the first opinion, reported at 119 U.S. App. D.C. 33, 335 F 2d 994 (1964), heard the arguments on the second appeal and entered its judgment affirming the trial court's allowance of respondent's counterclaim for counsel fees (Appendix A).

The record clearly shows that the litigation costs did not arise out of any default by petitioner under the promissory note secured by the deed of trust; nor has the respondent ever contended the contrary.

REASONS FOR GRANTING THE WRIT

The Court of Appeals (Appendix A) has held:

(a) A clause in the default provisions of a deed of trust securing a promissory note to pay "expense of litigation as aforesaid" may properly be interjected by the mortgage creditor (who is also the seller) into a contract dispute for specific performance of the contract of sale between the purchaser and seller so as to burden the losing litigant (who is also the mortgage debtor) with the counsel fees of the prevailing party in said contract action, notwithstanding that

(1) there was no default by the mortgage debtor in any respect under the promissory note secured by the deed of trust;

(2) The mortgage debtor in his capacity as purchaser was the plaintiff in the contract action, and

(3) the counsel fees were exclusively incurred by the seller (who is also the mortgage creditor) in defending

the suit for specific performance under the contract of sale.

(b) The above holding was decided "implicitly" in the first opinion, 119 U.S. App. D.C. 33, 335 F 2d 994, which is utterly devoid of any mention of respondent's "counterclaim," "counsel fees," or "litigation expenses," and "expressly" confirmed in the current opinion (Appendix A)[4] on the simple ipse dixit "that the litigation expenses are provided for by the note and deed of trust" without any judicial reasoning or citation of authority.[5]

The resulting decision is in conflict with many decisions of this Court dating back to the earliest days of the republic, which have consistently held that each party litigant bears his own counsel fees except where a contrary rule is required by statute, by rule of court, or by clear contract provisions, e.g., counsel fees incurred in ac-

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[4] ". . . our first decision, which is the law of the case, reversed the District Courts' [sic] denial of the counterclaim and directed the entry of summary judgment *thereon* in favor of [respondent]" (Emphasis added). This phraseology, including the elliptical use of the word "thereon," conveys the impression that the first decision had directed summary judgment on the counterclaim. A line-by-line reading of 119 U.S. App. D.C. 33, 335 F 2d 994, of course, discloses nothing of the kind; neither the opinion nor the certified copy of the judgment mentioned "counterclaim" or "counsel fees" or "litigation expenses."

[5] An examination of the appellate opinions of the District of Columbia Circuit reported in vols. 119 and 120 of U.S. App. D.C. and the slip opinions through April 8, 1966, shows that of a total of 267 cases in which formal opinions were written (exclusive of per curiam orders), only two opinions contain no citations of precedents, statutes, or text authorities. The remaining 265 opinions formally accord with the expectations of the bar and bench that an appellate opinion "tells any interested person what the cause is and why the decision—*under the authorities*—is right, and perhaps why it is wise." (Emphasis added). Llewellyn, The Common Law Tradition: Deciding Appeals (1960), p. 26. The two exceptional opinions are the first (119 U.S. App. D.C. 33, 335 F 2d 994) and second (Appendix A) opinions in the litigation between petitioner and respondent, each of which was decided by the same panel.

tions to collect payments under bonds, notes, and mortgages.

The effect of the appellate opinion is suddenly to immunize the seller of property, who also happens to be a mortgage creditor, from any suit by the purchaser wholly apart from any default under the mortgage note, simply because the purchaser is also a mortgage debtor. Certainly, a purchaser of real property, in signing a deed of trust securing a purchase-money mortgage note, could not have reasonably expected that he thereby immunized the seller from the normal burden of paying his own counsel fees in a dispute over the interpretation and effect of the contract of sale. This opinion could have far-ranging effects wherever parties to a contract litigate their rights and obligations with respect to the acquisition and use of property sold under a purchase-money mortgage, including issues of financing, warranties of title, or restrictive techniques of discrimination.

To import a rule on litigation expenses contained in the default provisions of a deed of trust into a contract dispute for specific performance between purchaser and seller, wholly divorced from any default under the deed of trust, is unprecedented in the reported decisions of the courts of the United States. To adopt an unprecedented rule "implicitly" or ipse dixit offends the entire common-law tradition and especially traditions of the law of property, where precedents and detailed judicial reasoning have prevailed for centuries to the end that certainty may justly accord with the parties' reasonable expectations when they enter into contracts with one another for the sale of land and improvements.

Our reasons in detail are:

1. *It is the universal practice of the courts of the United States that the American litigant must pay his own counsel fees, except where a contrary result is required by statute, rule of court, or contractual provision.* For more than a century and a half, both Federal and State prac-

tice has firmly forbidden attempts by a prevailing litigant to collect his counsel fees from the loser, subject to "exceptional cases and for dominating reasons of justice." Sprague v. Ticonic National Bank, 307 U.S. 161, 167 83 L ed 1184, 1187, 59 S. Ct. 777, 780 (1939). As early as 1796, this Court summarily ruled in Arcambel v. Wiseman, 3 Dall. 306 1 L ed 613, that the general practice of the United States is "in opposition to the allowance of counsel fees as damages."

The reasons for this universal practice against charging the losing litigant with counsel fees have been stated many times. In a late 19th century opinion this Court said in Oelrichs v. Williams, 15 Wall. 211, 82 U.S. 224, 230, 21 L ed 43, 45 (1872):

> "The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.
>
> We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

As recently as 1964, this Court had occasion to reaffirm the national policy against allowing litigation expenses to the prevailing litigant as either costs or damages in Farmer v. Arabian American Oil Co., 379 U.S.

227, 235-236, 85 S. Ct. 411, 416, 13 L ed 2d 248, 254-255, where it said:

> "Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute. Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation." [6]

In Anibal Conte v. Flota Merconte del Estado, 277 F 2d 664 (2d Cir., 1960), Judge Henry Friendly, quoting Professor Goodhart's article on *Costs*, 38 Yale Law Journal 849, 872-77, (1929), said: "The American practice of generally not including counsel fees in costs was a deliberate departure from the English practice, stemming initially from the colonies' distrust of lawyers and continued because of a belief that the English system favored the wealthy and unduly penalized the losing party."

Needless to say, there is no statute or rule of court that would permit respondent's to recover counsel fees paid or incurred in defending an action for specific performance of a contract for the sale of real estate. It consequently follows that respondent's counterclaim for counsel fees has no merit unless he can point to a contractual provision imposing such an obligation.

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[6] The dissenting opinion of the 2nd Circuit in the same case said:

> "It has not been accident that the American litigant must bear his own cost of counsel and other trial expenses save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means." 324 F 2d 359, 365 (1963).

2. A clause on litigation expenses in the default provision of a deed of trust, securing a purchase-money mortgage, is limited to litigation expenses incurred as part of the collection process in the event of default by the mortgage debtor in the payment of the note or other specifically enumerated covenants relating to the security of the note, and has no application to other litigation between the parties.

The appellate court found in the default provision of the deed of trust (Appendix B) securing the purchase-money mortgage an obligation on the part of the petitioner to pay respondent's counsel fees in the contract action. The appellate court did so in the following fashion:

> "Hynning does not challenge the amount allowed by the District Court on the counterclaim, but argues that the 'expense of litigation' provisions of the deed of trust he executed to Partridge do not, in the circumstances of this case, authorize the allowance of counsel fees to the latter. The argument is not open to him because our first decision, which is the law of the case, reversed the District Courts' denial of the counterclaim and directed the entry of summary judgment thereon in favor of Partridge. Moreover, if the question were open, we would expressly hold, as we have heretofore implicitly held, that the litigation expenses are provided for by the note and deed of trust." [6a]

This is all the appellate court has said on the subject of counsel fees.

The case law is plainly settled that a contract provision imposing the obligation on one party to pay the counsel fees of another party must meet the test of clear and definite provisions.[7] Such an obligation cannot be drawn

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[6a] See n. 4, p. 6.

[7] See Anno: "Prevailing Party's Right to Recover Counsel Fees in Federal Courts," 8 L ed 2d 894-942, 902-905. "Of course, there

by a loose interpretation, divorced from the specific language of the obligation, the purposes of the parties, and the circumstances prevailing at the time the obligation was entered into. When such a provision is found in a document drawn by the party benefiting from the provision and submitted by him to the opposing party for execution, which is the usual situation in the preparation and execution in a deed of trust, then it is plain, as the courts have repeatedly held, that the provision will be construed against the party seeking to make use of the provision. The important points in the negotiation of a purchase-money mortgage are the amount of the loan, the interest cost, and the term of years. The other provisions of the deed of trust are usually regarded as "boiler-plate" and are assumed to be of standard application and scope.

The totality of the provisions in the deed of trust relating to litigation expenses or counsel fees are given in the margin, while the entire deed of trust is reproduced as Appendix B.[8]

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is no right to recover attorneys' fees pursuant to contract unless the contractual prerequisites of the right are met." Ibid., 905.

[8] From the first whereas clause of the deed of trust which recites the terms of the promissory note:

> "The Makers agree to pay all proper costs and expenses of collection, including reasonable attorney's fees, *in the event of such default.*" [Emphasis added].

From the second whereas clause of the deed of trust:

> "AND WHEREAS, the party hereto of the first part desires to secure the full and punctual payment of said debt and interest thereon . . . and also to secure the reimbursement to the holder or holders of said note and to the parties hereto of the second part . . . for all money which may be advanced as herein provided for, and for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity which may arise in respect to this Trust, or to the indebtedness or to the property herein mentioned, or in obtaining possession of the prem-

The purposes of the provision of the deed of trust on "expense of litigation as aforesaid" are plain: they provide security for the promissory note, its payment, and nothing more. They are *predicated upon default* by the mortgage debtor *which endangers the security*, such as his failure to pay principal or interest, insurance premiums, or taxes. The obligation to pay the "expense of litigation *as aforesaid*" is limited to expenses arising out of proceedings to remedy such default. These provisions on litigation expenses "as aforesaid" were obviously not intended to apply to any litigation expenses other than those "aforesaid." They could have no application to the expenses of the seller arising out of litigation seeking to compel him to comply with the terms of his contract of sale. Assuredly, it was not a purpose of these provisions of the deed of trust to exculpate the mortgage creditor from the costs of defending an action for breach of contract. In this respect the seller, who is also the mortgage creditor, must occupy the same posture as any other defendant with respect to counsel fees which are incurred in defending a contract action. By no stretch of the imagina-

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ises after any sale which may be made as hereinafter provided for."

From the second operative clause of the deed of trust:

"SECOND. *Upon any default being made* in payment of said note or of any installment of principal or interest thereon . . . or *upon any default* in payment, when due, of any tax or assessment . . . or *upon any default* in keeping, while this Trust exists, fire and extended-coverage insurance . . . or *upon any default* in payment, on demand, of any sum or sums advanced by the holder or holders of said note on account of any costs and expenses of this Trust, or on account of any such tax or assessment, or insurance, or expense of litigation, with interest thereon at six per centum from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax, or assessment, or insurance, or *expense of litigation as aforesaid*, the same may be paid by the holder or holders of said note, and all sums advanced in so doing, with interest, as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time)." [Emphasis added].

tion can a standard clause of a deed of trust on "expense of litigation as aforesaid," which is predicated upon default by the very words "as aforesaid," be twisted to cover counsel fees in a law suit against a mortgage creditor which is predicated, not upon default by the mortgage debtor, but upon the alleged breach of contract by the mortgage creditor.

Since neither the contract for the sale of real estate nor the deed of trust obligated the purchaser to pay counsel fees to the seller in an action for a breach by the seller of his contract for sale, the seller must pay his own counsel fees in defending against that action and cannot import into the contract dispute the purchaser's obligation to pay counsel fees under the deed of trust in the event of the mortgage debtor's default.

3. *Where an appellate court reversed and remanded the case for the entry of summary judgment for the prevailing party, the trial court has no authority but to issue the judgment as directed by the appellate court and nothing more; and in particular, may not consider a new motion for summary judgment.* The customary method of reversing the trial court is for the appellate court to remand the case for further proceedings not inconsistent with the judgment of the appellate court. 6 Moore's Federal Practice § 56.27. This type of remand for further proceedings leaves the trial court free to entertain new motions, e.g., for summary judgment, subject to the general direction of the appellate court as to issues decided on appeal, and the trial court may also decide issues which were left open on the appeal. However, the appellate court may restrict the action of the trial court on remand by directing it to issue the judgment specified by the appellate court. 6 Moore's op. cit. 56.27[2]. This is precisely what the appellate court did here.

Under a restrictive remand to enter summary judgment the trial court could only enter such judgment as

specified in the opinion of the appellate court, namely, denying specific performance of subordination, as requested by respondent in his motion in the trial court for summary judgment, which said nothing about a counterclaim for counsel fees (R. 26).

Upon remand in the trial court, respondent realized that his motion for summary judgment did not embrace the counterclaim for counsel fees because he promptly filed a *new* motion for summary judgment on the counterclaim (R. 57). Under the remand, the denial of specific performance and the assessment of costs were the only matters before the trial court. The act of the trial court became purely "ministerial", it cannot act on its own motion, but only in obedience to the specific mandate of its superior. Bastian v. Erickson, 114 F 2d 338 (10th Cir., 1940). It was, therefore, error for the trial court to have entertained a motion for summary judgment or to have conducted any further proceedings in the cause.

CONCLUSIONS

In requiring petitioner to pay the counsel fees of respondent in a law suit for breach of contract the appellate court has clearly deviated from the universal practice of the courts of the United States that each litigant pay his own counsel fees. Such a departure from settled judicial practice raises "an important question of judicial administration pertaining to the exercising of Federal equity jurisdiction," as this Court has already characterized the allowance of counsel fees in federal courts in granting certiorari in Sprague v. Ticonic National Bank, *supra*, at p. 162.

If the opinion of the Court of Appeals—that a mortgage debtor may be required to pay litigation expense in an action where no default has been made by him—is permitted to stand, mortgage debtors throughout the land on all economic levels may suddenly find their right to sue

greatly restricted by the threat of being saddled with the burdensome attorneys' fees of their opponents in such a suit. In effect this ruling could become an inadvertent immunization of the seller from any breach of contract pertaining to property merely because he has become a mortgage creditor under a purchase-money mortgage. These suits could include a subordination problem as in this litigation, or they could involve techniques of discrimination on the basis of religion, race, or class—in fact, the whole area of civil rights as they impinge upon the acquisition and use of property.

These issues are important to all persons who are or who may become purchasers of property and who give purchase-money mortgages to the seller. They are also of great importance to the nation's financial institutions which invest in mortgages. Plainly such a revolutionary change in the normal expectations of the parties to a contract needs greater justification than an "implicit" decision of an intermediate appellate court. This is especially so where a national policy against saddling the losing litigant with counsel fees of the prevailing side has been so well recognized throughout the United States for more than a century and a half.

It follows that the issue of charging counsel fees to the losing litigant plainly goes beyond "local rules of law" of the District of Columbia with which this Court has been loathe to interfere. Fisher v. United States, 328 U.S. 463, 476, 90 L ed 1382, 1390, 66 S. Ct. 1318, 1325 (1945). But even in a case of local law, this Court will interfere "in exceptional situations where egregious error has been committed." Ibid.

For the foregoing reasons it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,573

CLIFFORD J. HYNNING, As General Partner of and Trustee for Hynning Associates, a Limited Partnership,
Appellant

v.

DANIEL PARTRIDGE, III, as Trustee u/w Grace S. Partridge, et al.,
Appellees

Appeal from the United States District Court for the District of Columbia

---

Decided April 5, 1966

Mr. Clifford J. Hynning for appellant. *Messrs. Ben Ivan Melnicoff* and *Lawrence C. Moore* also entered appearances for appellant.

Mr. Philip F. Herrick for appellee, Daniel Partridge, III, as Trustee u/w Grace S. Partridge.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and DANAHER, *Circuit Judge*, and BASTIAN, *Senior Circuit Judge*.

WILBUR K. MILLER, *Senior Circuit Judge:* In the sale of certain real estate to Hynning, Partridge took from him a first trust to secure a portion of the purchase money, and agreed to and did subordinate it to a new trust executed by Hynning to another to secure funds borrowed for remodeling. When he declined to subordi-

nate a second time to a new and larger trust, Hynning sued in the United States District Court to require him to do so. Partridge pleaded he had satisfied his obligation to subordinate and counterclaimed, under the provisions of his deed of trust, for his litigation expenses, including counsel fees. The District Court denied Partridge's motion for sumary judgment, dismissed his counter claim, and awarded summary judgment to Hynning.

Partridge appealed "from that part of the final judgment" entered against him, and Hynning asked us to affirm the District Court's judgment "in its entirety." Our opinion reversing the judgment of the District Court [1] concluded with these words:

> ". . . [T]he judgment will be reversed and the cause will be remanded for the entry of summary judgment in favor of Partridge."

Accordingly, we entered a judgment which included the following:

> " . . . It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to enter judgment in favor of Partridge."

We also ordered that Partridge recover his taxable costs.

Before remand, no evidence had been presented as to the amount of Partridge's litigation expenses, which were minimal when the District Court's first judgment was entered. After remand, Hynning contended in the District Court that, as our opinion in the first case did not mention the District Court's denial of Partridge's counterclaim, our reversal was limited to the subordination issue and that, in effect, we had affirmed the District

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[1] Partridge v. Hynning, 118 U. S. App. D. C. 331, 335 F. (2d) 994 (1964), *cert. denied* 380 U. S. 911 (1965).

Court's denial of the counterclaim. Partridge contended that the entire judgment had been reversed and that only the amount of the litigation expenses remained to be determined.

The District Court held that this court had reversed the order of the District Court "in its entirety" and, after hearing evidence as to the amount of the litigation expenses, granted summary judgment to Partridge on the counterclaim. Hynning appeals.

We hold that the District Court properly interpreted our action. Our Rule 27(c) has the effect of requiring that an opinion and judgment be read together. While we did not discuss in our opinion the District Court's denial of the counterclaim, the judgment we entered included these words:

> ". . . the judgment of the District Court appealed from . . . is . . . reversed, and . . . this cause . . . is . . . remanded to the District Court with directions to enter judgment in favor of Partridge."

As we have seen, the "judgment appealed from" was the entire judgment of the District Court.

We think that when an appellate decision is without limitation as to how much of the trial court's decision is set aside, all is set aside. Moreover, the judgment we entered makes it clear that the District Court's first ruling was reversed in its entirety. The parties were then restored to the positions they held prior to the erroneous judgment and they were to proceed from that point. So, the counterclaim was reinstated, as the District Court held. Its only task then was to conduct an evidentiary hearing on the amount of the litigation expenses and to award Partridge summary judgment for the sum determined to be due.

Hynning does not challenge the amount allowed by the District Court on the counterclaim, but argues that the

"expense of litigation" provisions of the deed of trust he executed to Partridge do not, in the circumstances of this case, authorize the allowance of counsel fees to the latter. The argument is not open to him because our first decision, which is the law of the case, reversed the District Courts' denial of the counterclaim and directed the entry of summary judgment thereon in favor of Partridge. Moreover, if the question were open, we would expressly hold, as we have heretofore implicitly held, that the litigation expenses are provided for by the note and deed of trust.

Affirmed.

APPENDIX B

THIS DEED OF TRUST

Made on this fifth day of September, A.D. 1961, by and between Clifford J. Hynning, General Partner, under an Agreement of Limited Partnership, dated July 25, 1961, a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, as Trustee, of Arlington, Arlington County, State of Virgina, party hereto of the first part, and Victor Sadd and Charles E. Smoot, of the District of Columbia, parties hereto of the second part.

WHEREAS, the party hereto of the first part is justly indebted unto Daniel Partridge, III, Trustee u/w Grace S. Partridge, in the full sum of Sixty-six Thousand Nine Hundred Seventy-one Dollars and Sixty-three Cents ($66,971.63) for and being deferred purchase money for the sale of the hereinafter-described property, for which sum he has made, signed, and delivered his one certain principal promissory note bearing even date herewith, providing in part as follows:

> For value received, we jointly and severally, promise to pay to the order of Daniel Partridge, III, Trustee u/w Grace S. Partridge, the sum of Sixty-six Thousand Nine Hundred Seventy-one Dollars and Sixty-three Cents ($66,971.63) at the office of the payee, with interest from November 5, 1961 until paid at the rate of 6% per annum, said interest payable in semiannual installments commencing six months after the date hereof. Said principal payable in semiannual installments of $2,000 each, with the privilege of making additional payments of $2,000 on account of principal at any semiannual principal payment date. The balance, after application of the semiannual installments, to be due and payable fifteen years from the date hereof. Payments of the semiannual installments on account of principal shall commence April 30, 1963.

If default is made in the payment of any installment of principal or interest, when and as due on this promissory note, or if default is made in the performance of any of the terms, covenants and conditions of the Deed of Trust securing this note, the whole of the principal sum of this note then remaining unpaid, together with accrued interest thereon, shall become instantly due and payable. The Makers agree to pay all proper costs and expenses of collection, including reasonable attorney's fees, in the event of such default.

AND WHEREAS, the party hereto of the first part desires to secure the full and punctual payment of said debt and interest thereon as well as any and all substitutions, renewals, or extensions of said note or of any part thereof or of any substituted note, with interest on such renewals or extensions at such rate of interest as may be agreed upon, and of any notes given for interest covering any extension with interest thereon from maturity of the same (which renewals or extensions of the debt or any part thereof, hereby secured, or any change in its terms or rate of interest payable on same, shall not impair in any manner the validity of, or priority of this Trust); and also to secure the reimbursement to the holder or holders of said note and to the parties hereto of the second part, or the survivor or his heirs or substituted Trustee, and any purchaser or purchasers, grantee or grantees under any sale or sales under the provisions of this Trust, for all money which may be advanced as herein provided for, and for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity, which may arise in respect of this Trust, or to the indebtedness or to the property herein mentioned, or in obtaining possession of the premises after any sale which may be made as hereinafter provided for.

NOW THEREFORE, THIS DEED OF TRUST WITNESSETH:—That the party hereto of the first part, in consideration of the premises and of One Dollar in lawful money, does grant, bargain, sell, and convey unto the parties hereto of the second part in fee simple, the following-described land and premises; with the improvements, easements, rights, ways, and appurtenances thereunto belonging, situate and lying in the City of Washington, District of Columbia, namely:—

> Lots Two (2) and Three (3) in Thomas Sunderland's subdivision of lots in Square One Hundred Fifteen (115), as per plat recorded in Liber No. 10, Folio 53, of the Records of the Office of the Surveyor of the District of Columbia.

TO HAVE AND TO HOLD the said described land and premises unto and to the only use of the said parties hereto of the second part, in fee simple.

IN AND UPON THE USES AND TRUSTS FOLLOWING, that is to say:—

FIRST: Until any default in payment of any matter of indebtedness hereby secured as herein provided for, to permit the said party hereto of the first part, his successors and assigns, to possess and enjoy said described premises and to receive the issues and profits thereof; and on full payment of said note, and of any substitutions, extensions, or renewals thereof, and the interest thereon, and all sums advanced or expended in respect of this Trust (including cost of advertising and such commissions as may be allowed by law and are not otherwise herein provided for), to release and reconvey in fee unto and at the cost of the said party hereto of the first part or the party or parties then claiming under him, the aforesaid land and premises.

SECOND: Upon any default being made in payment of said note or of any installment of principal or interest

thereon, or of any substitution, renewal, or extension thereof, or of any note or notes hereafter given for interest covering any extension, with interest thereon from maturity of the same, when and as the same shall become due and payable; or upon any default in payment, when due, of any tax or assessment, general or special, now or hereafter assessed against said land and premises or any part thereof, while this Trust exists, or upon any default in keeping, while this Trust exists, fire and extended-coverage insurance on the buildings on said land in an amount, in the name, and to the satisfaction of the parties hereto of the second part, who may select and designate the company or companies in which such insurance shall be placed, and who shall apply whatever may be received therefrom to the payment of the matters hereby secured, whether then due or not, unless the party secured hereby shall waive the right to have the same so applied, or upon any default in payment, on demand, of any sum or sums advanced by the holder or holders of said note on account of any costs and expenses of this Trust, or on account of any such tax or assessment, or insurance, or expense of litigation, with interest thereon at six per centum from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax, or assessment, or insurance, or expense of litigation as aforesaid, the same may be paid by the holder or holders of said note, and all sums advanced in so doing, with interest, as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then upon any and every such default so made as aforesaid, the said parties hereto of the second part, or the survivor or his heirs or substituted Trustee, shall sell the aforesaid land and premises and improvements at public auction at such time and place, upon such terms and conditions, and after such previous public notice, with such postponement of sale or resale as to the said parties hereto of the second part, or the survivor or his heirs or substituted Trustee, shall

seem best for the interest of all parties concerned; and (the terms of sale being complied with) shall convey in fee to and at the cost of the purchaser the premises so sold, such purchaser being hereby discharged from all liability for the application of the purchase money; and shall apply the proceeds of sale (after paying all expenses of sale, all taxes and assessments thereon due, all sums advanced for costs or taxes and assessments, or insurance or expense of litigation as aforesaid, with interest as aforesaid, and a Trustee's commission of five per centum (5%) on the gross amount of the sale), to the payment of the aforesaid indebtedness, or so much thereof as may then remain unpaid, whether then due or not, and the interest thereon to date of payment (it being agreed that the said note shall, upon such sale being made before the maturity of said note or before the maturity of any substitution therefor, or renewal or extension thereof, be and become immediately due and payable, at the election of the holder thereof), paying over the surplus, if any, to the said party hereto of the first part, his successors or assigns, upon the surrender and delivery to the purchaser, his, her, or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession thereof.

AND the said party hereto of the first part does hereby covenant: that he will warrant specially the property hereby conveyed; that he will execute such further assurances of said land as may be requisite for vesting title in the said parties hereto of the second part, for the uses and purposes and upon the trusts hereinbefore declared; that he will pay the aforesaid taxes and assessments and insurance premiums as the same become due and payable during the existence of this Trust; and that he will keep the property in good repair and clean and in good order.

AND the said party hereto of the first part, for himself and his successors and assigns, in order to further

secure the payment of said note, does hereby assign to the parties hereto of the second part and the holder or holders of said promissory note each and all of the leases and other rental agreements, oral and written, which may be in force at the time of any of and after the above-mentioned defaults; and authorizes said holder or holders to collect all rents from said land and premises; and all money received under this assignment and authorization shall be applied to the reduction of said indebtedness, after first deducting therefrom such reasonable costs and expenses, including attorney's fees, court costs, and all other items of expense as may be incurred in and about the collection of said rent; and agrees that in the event of any such default a receiver may be appointed to take over the operation of said land and premises and the rents, issues, and profits thereof, upon the application of the holder or holders of said note.

AND the parties hereto covenant and agree that said holder or holders shall be entitled to remove, substitute, or add a Trustee or Trustees, at the option of said holder or holders, with or without cause or notice, by instrument duly executed, acknowledged, and filed for record in the Office of the Recorder of Deeds for the District of Columbia.

AND the said party hereto of the first part covenants and agrees that all personal property used in connection with the operation of the buildings, together with all fixtures now or hereinafter attached to the premises, shall be deemed to be an accession to the freehold and a part of the realty, and the same are covered by this Deed of Trust and included in the terms "land" and "premises" wherever used herein.

Said land and premises are now subject to a prior First-Trust lien. The holder of said note and the parties hereto agree that the lien created by this Trust may be subordinated to a new First Trust, provided the entire

net proceeds thereof be used to pay the balance due on the present First Trust and the remodeling of the improvements on said land. The Trustee or Trustees acting hereunder shall execute such further instruments as may be desirable to effectuate this right of subordination.

The party hereto of the first part, for himself and his successors and assigns, agrees to promptly pay, as and when due, any and all indebtedness secured by any lien on said land and premises which is now or may hereafter be prior to the lien created by this Deed of Trust, or which may be a cloud on the title of the said party hereto of the first part to said land and premises.

IN TESTIMONY WHEREOF, on the day and year first hereinbefore written, the said party hereto of the first part has hereunto set his hand and seal.

/s/ CLIFFORD J. HYNNING [SEAL]
General Partner under an Agreement of Limited Partnership, dated July 25, 1961, a Certificate of which was filed in the United States District Court for the District of Columbia on September 7, 1961, as Trustee.

Signed, sealed, and delivered
in the presence of:—

/s/ C. E. BRADBURY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 458

CLIFFORD J. HYNNING, As General Partner of and Trustee for Hynning Associates, a Limited Partnership, *Petitioner*

v.

DANIEL PARTRIDGE, III, As Trustee, u/w Grace S. Partridge, et al., *Respondent*

Brief in Opposition to Petition for Writ of Certiorari

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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QUESTIONS PRESENTED

Respondent would phrase the questions in this case as follows:

1. Whether litigation expenses (primarily attorney's fees) are called for by the deed of trust executed by petitioner on September 5, 1961.

2. Whether the questions raised by petitioner are not res judicata.

STATEMENT OF THE CASE

The primary question is whether the litigation expenses which have been granted to respondent by the judgment below are called for by a contract between the parties. The contract is the deed of trust (Appendix B, Petition for Writ of Certiorari) which was executed by the petitioner on September 5, 1961. The matter relates to a private contract between private parties relative to private property located in the District of Columbia.

On June 30, 1961, respondent sold two private residences on N Street, N. W., Washington, D. C., which he owned as a testamentary trustee, to the petitioner, who desired to convert them to an office building. Petitioner paid partly in cash, partly by assuming an existing mortgage, and partly by a note secured by a purchase money deed of trust, and the respondent agreed to subordinate his purchase money deed of trust to a new first trust to be obtained by petitioner for the purpose of remodeling the properties.

On March 16, 1962 petitioner obtained a loan of $132,500 from Perpetual Building Association and on the same day respondent subordinated his deed of trust to the Perpetual loan. The cost of remodeling turned out to be more than the Perpetual loan by about $37,800, and petitioner called upon respondent to subordinate again, this time in the larger amount. Respondent refused, and petitioner filed suit in the District Court for the District of Columbia to compel the second subordination (*Hynning, etc.* v. *Partridge, Trustee et al.*, C.A. No. 1193-63). Respondent answered and also counterclaimed for his expenses of litigation. The matter went before the District Court on cross motions for summary judgment and the Court granted

summary judgment to petitioner and denied respondent's counterclaim (R. 53-55).

Respondent appealed on both points (R. 56), and the Court of Appeals for the District of Columbia Circuit reversed (*Partridge* v. *Hynning,* 119 U.S. App. D.C. 33, 335 F. 2d 994 (1964)). While both parties briefed and argued the question of the counterclaim before the Court of Appeals, the Court did not specifically mention the counterclaim in its opinion. The opinion concluded, "the judgment will be reversed and the cause will be remanded for the entry of summary judgment in favor of Partridge." Petitioner then asked for reconsideration en banc, without mention of the litigation expenses, but this request was denied, and on September 24, 1964, the Court of Appeals sent its opinion and judgment to the District Court. The judgment reads:

> "It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with directions to enter judgment in favor of Partridge."

Respondent then sought certiorari, without mention of the litigation expenses,[1] but his petition was denied, *Hynning* v. *Partridge,* 380 U.S. 911 (1965).

Up to this point no evidence had been presented as to the amount of respondent's litigation expenses, such expenses having been minimal at the time his Motion for Summary Judgment was filed. When the case was

[1] The Petition states (p. 4) that neither side argued the issue of counsel fees before this Court. This is true, but it will be noted that petitioner did not tender this issue before this Court.

returned to the District Court the parties disagreed as to whether the reversal by the Court of Appeals left open any issue of law as to the litigation expenses, respondent contending and petitioner denying that the amount alone remained to be decided. A conference was held with the District Judge who suggested that the matter be set for hearing on a proper motion (R. 73). Respondent then filed a Motion for Summary Judgment for his litigation expenses. At the hearing on this motion petitioner contended that the reversal was limited to the subordination issue and that the District Court had no jurisdiction to entertain the counterclaim. Respondent contended that the entire case was reversed and that only the amount of the counterclaim remained to be decided. The District Court agreed with respondent, holding that the Court of Appeals had reversed the order of the District Court "in its entirety" (R. 63-64). Accordingly, the District Court, after hearing evidence as to the amount of the litigation expenses, granted summary judgment to respondent in the amount of $6,658.61 on the counterclaim, and petitioner appealed to the Circuit Court.

The Circuit Court held (see Appendix A, Petition for Certiorari) that the District Court had properly interpreted its first decision and that it was no longer open to petitioner to argue that litigation expenses were not allowable, and it further held that if the question were still open it would expressly hold that the litigation expenses are provided for by the note and the deed of trust.

ARGUMENT

I. The Litigation Expenses Are Properly Allowed Under the Terms of the Deed of Trust.

Respondent takes no issue with petitioner's general contention that American courts do not allow counsel fees to the prevailing party unless such fees are called for by statute, rule of court, or contract. Further, neither the District Court nor the Court of Appeals has taken issue with this general proposition. It is respondent's position, supported by the Courts below, that the litigation expenses in this case are called for by contract, i.e., by the clear provisions of the deed of trust.

The deed of trust recites its own raison d'etre. It is to enable the noteholder to come out whole, specifically with respect to principal and interest, advances which the holder may have to make for taxes and insurance, "and for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity, which may arise with respect to this Trust, or to the indebtedness or to the property herein mentioned, or in obtaining possession of the premises after any sale which may be made as hereinafter provided for" (R. 30).

The litigation involved here was in equity. It arose with respect to "this Trust"; indeed, the Trust was the object of the litigation. The litigation expenses therefore appear to be clearly within the purpose of the deed of trust.

They are also within the letter of the deed of trust. The second operative paragraph (beginning at R. 31) sets forth certain defaults which create claims "demandable at any time" (R. 32). These are (1) default

in the payment of any installment of principal or interest (R. 32), (2) default in the payment of any tax or assessment (R. 31), (3) default on keeping up the insurance on the buildings (R. 31) and (4) "default in payment, on demand, of any sum or sums advanced by the holder . . . of said note on account of any costs or expenses of this Trust, or on account of any such tax or assessment, or insurance, or expense of litigation, with interest thereon at six percentum from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax, or assessment, or insurance, or expense of litigation as aforesaid, the same may be paid by the holder or holders of said note, and all sums advanced in so doing, with interest, as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time)" (R. 32). The term "expense of litigation" in this paragraph refers back to the second "whereas" clause, where it is defined as "any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity, which may arise in respect to this Trust, or to the indebtedness or to the property" (R. 30). It cannot refer to any thing else because it is not specifically referred to anywhere else. The phrase as used in the second operative clause is therefore the same as defined in the "whereas" clause. It clearly covered respondent's expense of litigation as allowed by the District Court.

The "demand" in this case is contained in the counterclaim (R. 25). There was a default in the payment of the litigation expenses as soon as petitioner failed to meet the demand or denied it, as he did in his answer to the counterclaim. The demand was not and could not be a liquidated demand until the District Court held a hearing, as it did on June 22, 1965 (R. 62).

II. The Matter Is Purely One of Local Law and Has Been Decided by the Highest Court of the District of Columbia.

The problem relates solely to the interpretation of a local contract. It involves only local parties and local real estate. The case has no federal or national flavor. The decision below is clearly correct. Certainly there is no "egregious error", Cf. *Griffin* v. *United States,* 336 U.S. 704, 717-718 (1949), reh. den. 337 U.S. 921 (1949); *Fisher* v. *United States,* 378 U.S. 463, 416 (1945).

III. The District Court Did Not Violate the Instructions of the Court of Appeals.

Petitioner contends (Petition, pp. 13-14) that the District Court had no authority under the 1964 mandate of the Court of Appeals to consider a motion for summary judgment. The short answer to this is that the Court of Appeals is the best judge of what it ordered, and it said in its second opinion, "We hold that the District Court properly interpreted our action." Parenthetically it may be noted that respondent's new Motion for Summary Judgment might just as well have been called a "Motion To Determine Amount of Litigation Expenses." The form is not important.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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